THE GROWTH OF THE IDEA OF ANNEXATION, AND ITS BREAKING UPON CONSTITUTIONAL LAW.

A Study among the Records of Congress.[1]

CONSTITUTIONAL law, although based upon a fixed form of words, seems to be a barometer peculiarly susceptible to changes in that strange atmosphere termed, for want of a better expression, public opinion. Public opinion affects all branches of the law, — common law by the imperceptible modification of centuries; statute law more directly and rapidly, for a momentary whim of the legislature may change it. Although not so sensitive as a mere statute, a constitution sometimes appears more like a legislative act than a rule of law; for its interpretation varies — rightly or wrongly — as varies the legislative mind of the people. A perfect grasp of the constitutional law upon a given point, therefore requires a feeling with the nerves, historic and economic, which have vibrated with the life of the people. But when we examine national feelings in order to find their bearing upon the law, we cannot be too careful not to fall into the error of supposing that every idea when once accepted becomes a part of the law. We must never forget the nature of law. Not all the ideas of any particular age of what is just and right are included in it; law is a crystallization of those rules which the consensus of opinion of successive ages agrees to be not only just but necessary for the convenient living of the people at large. This conception is especially true of written constitutional law; the crystallization there is artificial, but when the crystals are wisely formed they consist of only a few fundamental rules, of the soundness of which there can never be a doubt. And such an instrument the framers of our Constitution intended to make; it is a constant, in connection with which fluctuate the different variables of public opinion.

The relation of public opinion to the Constitution is twofold. We must know the state of public opinion at the time the Consti-

[1] This manuscript was in the hands of the Editor on July 1, 1899. Since that time, it is scarce necessary to add, the statement of the law has not been altered.

tution was framed in order to interpret the express provisions in the light of it; in the second place we must know these doctrines sanctioned by public opinion which nevertheless were not made a part of the Constitution, in order that when public opinion in regard to them is seen to have changed, we may say "the Constitution does not forbid this change."

Pursuing the study of the Constitution in this method, I aim in this paper to consider its attitude towards the acquisition of territory by the United States. Are there limitations to the power to acquire territory, and if so what are they? In answering this question, we must first consider the state of public opinion at the time the Constitution was framed; and the first evidence of this opinion to be dealt with is found in the debates of the convention which framed the Constitution.

The constitutional convention finally gave to the national government the power to make war, the power to make treaties, the power to admit new states, and the power to legislate for certain stated objects. In all of these ways territory might conceivably be acquired; add to these acquisition by discovery, and we have the sum of the possible manners of acquisition. Whether our government has all of these chances open to it is another question.

Only in connection with the admission of new states do we gain any enlightenment from the proceedings of the convention. We have a statement, it is true, of Gouverneur Morris, who proposed the clause giving to Congress power to make the needful regulations for the territory of the United States, that he looked forward to governing not only the western territory already possessed, but whatever might subsequently be acquired; he contemplated as a probability the possession of all of North America, or even more.[1] And so Hamilton in a letter to Washington: "We must remain in a position to take advantage of circumstances, we must be prepared to acquire Florida, and to annex Louisiana, and we must even wink further south."[2] Neither Morris nor Hamilton say how they expect to acquire territory; but it is significant that they recognize the power. It is also significant that both were federalists, with the national idea at heart; and it is very doubtful in the light of subsequent events whether Jefferson agreed with them.

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[1] Letter quoted by Mr. Justice Campbell in Scott *v.* Sanford, 19 How. 507.

[2] Letter quoted by Holmes of South Carolina in the House of Representatives during the Texas debate. Cong. Globe, 28th Cong. 2d Sess. 135, 136.

The admission of new states had been provided for in the Articles of Confederation.[1] "Canada acceding to this confederation and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of the Union; but no other colony shall be admitted to the same unless such admission be agreed to by nine states." This provision is expansive, and it is not likely that the later Constitution was meant to be less so. The first resolve presented to the constitutional convention was by Randolph of Virginia, who thought that arrangements should be made "for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government or territory or otherwise, with the consent of a number of voices in the national legislature less than the whole."[2] Nothing could be more ambiguous than this; probably he was thinking of new states becoming included within the limits of the sovereign United States by those limits being enlarged either by warlike or by peaceful means; he may have been trying merely to cover the strange case of those of the thirteen who might not at first ratify the constitution, or the case of Vermont, which was hanging to New York by a slender thread. Two non-committal resolutions followed; the matter was then referred to a committee of five who reported a clause which, in part, provided that "new states lawfully constituted or established within the limits of the United States may be admitted by the legislature into this government,"[3] by a vote of two-thirds of each house. This clause seems to have the same meaning, or lack of meaning, as Randolph's proposition; and the words "within the limits" hardly refer solely to the limits then existing. But these words were struck out by the convention in striking out the whole phrase, "lawfully constituted and established within the limits;" so that the clause as adopted reads simply, "New states may be admitted into this Union."[4] The reason for the change was probably for the benefit of Vermont, the convention being in doubt whether Vermont's establishment could be called lawful. The emphasis of the change does not seem to have been laid on the words "within the limits," nor do they seem to have been looked upon as unduly restrictive; so far as they meant anything, they probably meant that territory must first be annexed and made "within the limits" of the nation before it could become

[1] Art. xi.
[2] Ell. Deb. iv. 42.
[3] Art. 17. Ell. Deb. iv. 123.
[4] Const. Art. iv. sec. 3.

a state; but striking them out hardly signified that power was granted to admit as states territory not yet annexed.[1] Then follows the restriction — which was also in the clause reported by the committee of five — that "no new states shall be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned as well as of Congress." From this clause, however, no general restriction can be implied; the clause was a sop to those who were jealous on behalf of the states; it protected the states; it did not restrict the admission of other states when their admission interfered with no rights of existing states. Upon the whole then the growth of this clause favors the belief that territory not yet belonging to the United States might one day become a state; and this belief does not require us to go to the length of saying that by virtue of this clause and no more Congress could admit territory without first annexing it. The manner of acquiring territory, and the tests for eligibility, we still must guess about; all that we may be at all safe in assuming is that the federalists thought they were creating a sovereign able to annex adjacent territory by any of the acts of sovereignty suitable thereto; otherwise the letters of Morris and of Hamilton would be meaningless.

Having now glanced over this most direct evidence of the opinion of the time without finding an answer to our inquiries, we may at least have some success in discovering what territory was sought for by filling in the vague outline which we have found with the prevalent colors of the public thought. I am dealing not with details, but with general characteristics. Public opinion at the time our Constitution went into operation had a character decidedly individualistic, especially in New England. The doctrine of the Pilgrims of religious toleration, and the rather intolerant independence of the Puritans, marked a distinct break with the sovereign government of the past, — a break accomplishing in a comparatively short time the results which required two centuries of change in more conservative England. The thought was laying hold of men's minds that grades of rank and authority among private persons must give way to the freedom of each person from arbitrary restraints, that each man is free to think and act so long as he interferes with no one else, that he may have a voice in his own political

[1] But see many arguments during the Texas debate, as, for instance, that of Ficklin of Illinois. Cong. Globe, 28th Cong. 2d Sess. 182.

systems, and that he is not to be constrained by a law which he has not had a voice in enacting. The same movement in England, following the lead of Bentham, resulted in the repeal of the Test Act, and the measures for Catholic emancipation, the reform of Parliament, and the relief from imprisonment for debt.[1] In this country the movement was not impeded by so much immemorial custom as in England, but it is a mistake to suppose that by 1788 the colonies had finished the work which in England continued until the reform bill of 1833 and later. Earlier than England the start had indeed been made; and the intense events of the revolution had brought matters somewhat to a head. But the application of these principles to practical legislation for private persons was by no means fully developed; and municipal legislation in some respects might have done credit to a veritable despotism. In 1640 the colony of Massachusetts Bay had passed a declaration of rights resembling the fourteenth amendment; but at the same time the people of Dorchester, Massachusetts, New Haven, Connecticut, and other towns, were forbidden by law to alienate their property without the consent of the town.[2] Bentham would hardly have looked with favor upon that idea. Yet until the Revolution there were similar laws upon the statute books.[3]

The ideas of individualism are most frequently thought of and spoken of in connection with the rights and duties of individual persons; but their application will be found to be equally clear to the rights and duties of nations, in which we are now more particularly interested. Although the analogy between persons and nations is not always perfect, and principles applicable to the one are not always applicable to the other without modification, the analogy between the two is in the present instance instructive, and public opinion in 1788 applied the same broad general principles in both cases. The same rights of individual freedom from restraint were accorded to collective persons, townships, states, sovereigns; and the corresponding duty was imposed of respecting those rights in others. Just as the most selfish person desired above all things

[1] For the general conception and the history of these changes in public opinion in England, a discussion of the different phases of individualism, followed by a treatment of the great change which took place during the middle of this century, I am indebted to Mr. Dicey, Vinerian Professor of Law at Oxford University, in the course of lectures delivered in the autumn of 1898 before the Harvard Law School. It is a matter of regret that as yet no published work of his can be referred to.

[2] Weeden, Economic and Social History of New England, i. 55–57.

[3] Weeden, ii. 519.

liberty to pursue his own ends, and asked only to be allowed freely and fairly to compete with his neighbor, — just as the most generous man thought it the greatest charity to allow his brother freedom and fairness in working out his problems for himself, so the most selfish nation desired above all things liberty to develop itself unhampered by the entanglements of the affairs of other nations, freely and fairly to compete with them, — so the most generous nation thought it the greatest charity to leave other nations free and unhampered to work out their national problems.

This one power of individualism generated the two great conflicting forces which shaped the course of the constitutional convention. Their variance was caused by the difference in the attitude of those who guided them. One party, then called the republicans, looked within at the sovereign state; they were unwilling to have each state part with the sovereignty which it had momentarily gained; they were jealous of giving any more power than was necessary to the central government. The phase of individualism which they represented, the individualism of the state, had early reached a full growth as the individualism of the colony. It had shown itself in the independent behavior of Massachusetts which led to the revocation of the charter. It asserted itself in youthful exuberance at the Boston Tea Party, and later it ignored the wishes of the Continental Congress with almost as much determination as it had ignored the will of King George. Of the disciples of this feeling Jefferson became the leader, and in all the thought and feeling which he gave to them they were at the head of the race of individualism; and in fact much is to be found in the writings of Jefferson not unlike some of the writings of Bentham. The other party looked without, and saw the need of a compact national existence to preserve the free and unrestrained life among the nations of the world; they were the federalists with Washington, Hamilton, and Marshall at their head. Their phase of individualism, that of the nation, had not been so early a growth as the first, but suggestions of it are found in the first weak attempts to form a union of colonies. The necessities of the revolution gave new strength; and the disastrous years of the confederation, which proved the *ultra* state rights theory to be a failure, re-enforced by the isolation of position of the new nation, set in motion the wave of national feeling which led to the adoption of the Constitution. Thus it is that the national phase of individualism dominates our fundamental law.

The difference of these two forces caused the difference in the great political parties; but a third force is not to be ignored, not a branch of the national idea, but another phase of individualism then less developed than the other; its direction was towards the freedom of each private man, and its power was strongest among the followers of Jefferson as the liberal party. The logical development of these ideas, or rather these three phases of a single idea, was what occupied the nation up to the Civil War.

We are now in a position to fill in the outlines, hinted at by the debates in the constitutional convention, of the territory which public opinion regarded as a possible part of the United States. We saw that Canada, Florida, and Louisiana were thought of. In the light of the doctrines of the national individualism we may now say generally that all land was looked upon as eligible which would, in the words of Jefferson, "naturally accede to our Union," land geographically a part of us, with inhabitants consenting to the union, akin to us in race and custom, — inhabitants who, becoming a natural part of our community, should promote our peace and prosperity at home, and strengthen us in the security of our independence of nations abroad.

This theoretical ideal of national individualism we may proceed to consider in its relations to historical facts, as our country began to have a history.[1]

After the original thirteen states had ratified the Constitution, Louisiana was the first land which was presented for annexation, and in that connection for the first time was the constitutional power to annex territory called in question. Some writers[2] have expressed a doubt as to our right to the northwest territory at the time the Constitution went into effect; that at all events is a preconstitutional question; by the ordinance of 1787 the Confederacy had assumed control, and the Constitution found the territory, for political purposes, the property of the nation. The case of Louisiana was the first arising under the new Constitution.

Trouble had arisen in 1803 over the suspension of our right of deposit at the port of New Orleans. This interfered seriously with our trade upon the Mississippi; it led also to disagreeable altercations with France, then embroiled in European wars. The obvious

[1] In treating the various additions to our territories, I omit lands such as the guano island of Navassa, for they have no significance from the point of view of national policy.

[2] Baldwin, Government of Island Territory, 12 HARV. LAW REV. 393.

thing to do was to buy the port, and the President could not help seeing it. Jefferson was President, the champion of the states and of democracy; and chance illogically enough chose his party to do the first act of national aggrandizement. He negotiated the treaty, and urged its adoption. His tone sounds of the national individual, the strength of the nation, the need of freeing our commerce at home and the necessity of holding aloof from European politics. Individual this is indeed, but its individualism is of the nation, and it sounded far from harshly to the ears of the federalists whom fate had placed in opposition. They had little heart in denying to the United States the right as a sovereign to acquire territory; they were naturally content to be side-tracked and to direct their attack upon the clause which provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States."[1] What this meant was not entirely clear; some appear to have construed it to mean that the United States was pledged as soon as possible to admit the new territory as a state of the Union;[2] another faction insisted that this clause merely pledged us to make the territory a part of the sovereign nation called the United States, without necessarily admitting it as a state.[3] In either case this was said to be an abuse of the treaty-making power. The incorporation, it was said by some, could not be accomplished without an act of Congress.[4] Pickering of Massachusetts went further and said it could not be done without the consent of all the states, treating them as a partnership.[5] These arguments looked from the point of view of the individuality of the state; they best became the mass of Jefferson's party; but politics ran too strong among that party to allow this matter of theoretical consistency to trouble their minds. Other objections came from those who looked from the point of view of the individual man, denying any power to the United States not expressly granted, and asserting the power of the people. Of these men Gaylord Griswold maintained that even if territory could be acquired by treaty, it could not be incorporated by anything short of the power of the people speaking through an amendment to the Constitution.[6] Others went so far as to deny that

[1] Treaty of April 30, 1803, Art. 3; 8 Stat. 200, 202.

[2] Cong. Ann., 8th Cong. 1st Sess. 44, 454, 459, (Pickering, Thatcher, and Griswold of Connecticut).

[3] Id. 49, 483 (Taylor and John Randolph).

[4] Id. 454 (Thatcher).

[5] Id. 44 (also Thatcher, 454, and Griswold of Connecticut, 459).

[6] Id. 432.

territory could be acquired at all except by amendment, all such power being retained by the people.[1] And John Quincy Adams, with characteristic altruism, applied the Benthamite doctrine not only to the people of the Union but to the people of Louisiana; and in their behalf, reading into the Constitution the doctrine of the Declaration of Independence, that all just government depends upon the consent of the governed, he maintained that in no way could the United States acquire foreign territory without the consent of the inhabitants of that territory.

These arguments were unavailing to defeat the treaty or to prevent appropriations for carrying it out.[2] As a matter of theory they would have come with far better grace from the party of Jefferson, and since for political reasons many of that party were content to ignore them, it is no wonder then that the doctrines died away. Those who logically should have supported them turned a deaf ear. I am not referring to their correctness; for the present I am dealing merely with events; and according to the tenets of the Jeffersonian creed it is not difficult to imagine how loud the echo of these arguments would have been if Jefferson and his adherents had been in opposition. Despite that gentleman's reticence we know what his opinions were. Incorporation of territory into the Union no doubt he thought unconstitutional, and, although he wavered somewhat, from his letter to Judge Breckinridge he appears to recognize no constitutional way whatever for holding foreign territory. "The Constitution," he says, "has made no provision for our holding foreign territory, still less for our incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of the country have done an act beyond the Constitution. The legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it."[3] His reasons for this opinion

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[1] This seems to have been Jefferson's view.

[2] 2 Stat. 245. For the arguments in defence of the treaty of Cong. Ann., 8th Cong. 2d Sess. 49, 58, 68, 446, 471, 483, by Taylor, Breckinridge, Nicholas, Elliott, Rodney, and Randolph.

[3] Jefferson, Works, viii. 244. Cong. Globe, 28th Cong. 281, 2d Sess., cited by Morehead of Kentucky. But see the letter to Gallatin during the same year, Works, viii. 241.

he does not explicitly state. That the power to acquire territory was retained by the people was doubtless his creed. The quest is difficult for information from a man who could write to his attorney general that "the less that is said about the constitutional difficulty the better, and that it will be desirable for Congress to do what is necessary *in silence*." [1] Again, in 1803, he writes to Nicholas, "Whenever [*sic*] Congress shall think it necessary to do should be done with as little debate as possible, and particularly as far as respects the constitutional difficulty." [2] By these tactics he kept his party well under control, imposed upon them the policy of absorbing outlying territory, and forced upon the federalists an opposition little consistent with their original instincts and their general belief in the individualism of the nation. Forty years later opposition to the fulness of the powers of the national sovereign was taunted as "federalism." [3] This political hoax was the first move by which the course of politics nullified the force of what might have become, rightly or wrongly, a dominant legal doctrine.

The accomplished fact of annexation of Louisiana had great influence, no doubt, upon legal thinking. It became, politically speaking, *chose jugée*, not indeed a legal authority but entitled to some weight. So far as it has weight, no more should be attached to it than is its due. The acquisition must be read with all the facts; it expressed the national individualism; it was defensive, to preserve the national unity; a mere taking of adjoining land to protect the peace and prosperity at home; it was subjective, not objective.[4]

The same ideas controlled the next acquisition of territory. Florida was acquired by treaty with Spain in 1819, with a proviso for incorporation into the Union essentially like that in regard to Louisiana.[5] The prevailing feeling that led to it was the same that expressed itself in the Monroe doctrine, the wish to insure safety at home by keeping from our immediate vicinity the influence of European powers.[6] There was practically no opposition to the taking of Florida, which was accepted as a matter of course. The most serious objection, in fact, was made to quite a different part of the treaty, the clause withdrawing the claims of the United States to Texas. This withdrawal had really no significance upon

[1] Cong. Globe, 28th Cong. 281, 2d Sess., quoted by Morehead.
[2] Ibid.
[3] Cong. Globe, 28th Cong. 2d Sess. 100, speech of Yancy of Alabama.
[4] Jefferson's Message, Cong. Ann., 8th Cong. 1st Sess. 11, 14, 15.
[5] 8 Stat. 252. The treaty was ratified February 19, 1821.
[6] Monroe's Message.

national policy; it amounted merely to a compromise in regard to disputed territory; it is interesting chiefly by reason of the stress laid upon it in 1844 by certain supporters of the admission of Texas, who persisted in their belief that Texas had never rightfully been parted with.[1] Adams, who as secretary of state negotiated the treaty, looked upon it merely as the waiver of a doubtful claim, recognized the advantage of some day acquiring Texas, and afterwards when president set on foot fruitless attempts to purchase it from Mexico, with always a provision for obtaining the consent of the people of Texas.[2]

With Adams, as we have seen, began the Texas question; with him too began the question of the acquisition of Cuba. He looked upon taking that island as a thing as politic as the taking of Florida, in order to remove Spain further from us and to add to the unity of the Union.[3] He thought of it as involving no matter of foreign politics, — still the subjective standpoint. And Jefferson agreed with him.[4] No definite results were reached by either of them in this matter; but the policy of the administrations of Monroe and Adams seems to have had this basis. Cuba was threatened by France and also by Columbia and Mexico. Our influence was used not only to keep France away, in accord with the Monroe doctrine, but to prevent the other American states from encroaching.[5]

Adams was doubtless profoundly thankful twenty years later that he had not obtained either Texas or Cuba. At the time men hardly realized the presence of what it has become the fashion to call the thundercloud of slavery, hanging over the country.[6] But the afore-

[1] Cong. Globe, 28th Cong. 2d Sess. 328, 332 (Ashley and Dayton in the Senate); and 87, 95, 130, 158 (Belser, Douglass, Tibbatts, and Hammett in the House).

[2] Cong Globe, 28th Cong. 2d Sess. 188, 190.

[3] Ibid.

[4] Quoted by Walker, Cong. Globe, 28th Cong. 2d Sess. 344, as saying of Cuba, Texas, and Florida, "They would naturally accede to this Union." See also Jefferson, Works, ix. 125; x. 159, 250, 278. On October 24, 1823, Jefferson wrote to Monroe: "I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida Point, this island would give us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being."

[5] Lodge, the Spanish-American War, Harper's Monthly, xcviii. 449, 450.

[6] The slaveholders were the first to realize this; they made the most serious opposition to sending delegates to the Panama Congress in 1826, and their reason was that the black republic of Hayti was to be represented. Earlier than this, when Florida was acquired, the South looked on with complacency, but the slavery question was not generally discerned in all its bearings. This is all the more surprising in view of the struggle which took place over the Missouri compromise at so nearly the same time.

said thundercloud grew rapidly blacker, and, as those who invented the figure would say, its rumblings rendered inaudible the clear voice of constitutional law. Different views of the law existed, but in choosing between them political considerations often turned the scale. And these political considerations were the primary forces in directing the next acquisitions of territory, and they mark a second stage in our history of national enlargement. The ideal of national individualism is still a latent and powerful force; but motives have become more complex. The new feelings which govern this second stage of territorial growth must be examined, and we find that all in the last analysis are different manifestations of the ideas of individualism.

The institution of slavery called to its aid the doctrine of state rights, resting upon the sovereignty of the individual states as opposed to the nation. This doctrine was an inheritance from the Articles of Confederation, and when invoked in the cause of slavery it reached an extravagant extent. As opposed to it the abolitionists advanced the *ultra* theory of the freedom of each individual man, asserting even that Congress had power to abolish slavery within the states. So bitter became the slave states that they ignored their inconsistency in applying their idea of individualism to their states and applying the idea of despotism to those who labored within the states.[1] The abolitionists ignored their inconsistency in wishing to free the slaves at the expense of the constitutional freedom of the individual states. Those alone were consistent who conceded that slavery could not be abolished within the states, but contended that no new slave states should be admitted to the Union. It was along these lines that the battle against slavery was fought, until true individualism triumphed in Lincoln's Emancipation Proclamation and Lee's surrender at Appomattox.

The bearing of this condition of things upon the acquisition of territory is obvious. The South was determined to have new slave states. As, in the case of Louisiana, the state rights men were compelled to favor the power of the nation to take new

[1] This antinomy appeared in livid colors when Kossuth came to America, and a cry went up from South as well as North to help the cause of the liberty of Hungary; but Kossuth had to be cautioned against mentioning domestic slavery in any of his speeches. 4 Von Holst, 65–80.

Mr. Foote of Alabama, in a speech in the Senate eulogizing Kossuth, forgot himself so far as to declaim that the man who was not for freedom was for slavery. "Entirely right," remarked Mr. Hale of Maine.

territory into the Union, so now the power of slavery forced them to take the same position irrevocably. And this was the death-blow to the Jeffersonian belief that the people alone could acquire territory.

The story of the rebellion of Texas against Mexico, the intrigues of politicians and even presidents to obtain its acquisition as a slave state of the Union, the negotiation of the treaty by Tyler and its defeat in the Senate, — this story belongs to the historian.[1] The rejection of the treaty was not in the main on constitutional grounds, although some senators reiterated the arguments already noticed, and Rufus Choate went into a metaphysical argument to prove that the admission of a sovereign nation like Texas did not come under the treaty-making power. A new president and congress would come into power in less than a year, and no time was to be lost. So the annexationists in the House introduced various joint resolutions to accomplish their end by legislative act. This ruse was a novel one, and its opponents in the north were satisfied to attack it for its departure from what had already become tradition. Their general argument was this: we will grant, at least for the sake of argument, that foreign territory can be taken by treaty, but it cannot be taken by legislative act, because Congress has no power to deal directly with foreign nations; only the treaty-making power can do that.[2] A few went beyond this position. Choate, who with lawyer-like care had already committed himself only to the extent of saying that the taking of a foreign state was not within the treaty-making power, was now forced to state his opinion that in no way short of constitutional amendment could new territory be admitted — unless indeed in settlement of boundary dispute.[3] Winthrop in the House took the same view,[4] and Brengle,[5] citing Jefferson in justification, and Barnard[6] of New York. McIlvaine[7] of Pennsylvania was perhaps the only one to deny the possibility of obtaining any foreign territory. In spite of the distinguished support which Jefferson's views found in Choate and Winthrop, the fact that such men had so few followers shows the weakness of the

[1] This story is well told in Von Holst, volumes 3 and 4.

[2] Cong. Globe, 28th Cong. 2d Sess. 247, 292, 278, 344, 358, 359 (in the Senate, Rives, Morehead, Berrien, Crittenden, and Archer, chairman of the Senate Committee on Foreign Affairs); and 108, 141 (in the House, C. B. Smith and Severance). This view was not confined to the north; it was generally understood to be Calhoun's belief.

[3] Cong. Globe, 28th Cong. 2d Sess. 303.

[4] Id. 94. [5] Id. 119. [6] Id. 187.

[7] Id. 190.

cause; their opponents were able to retort Jefferson's apostasy.[1] Adams still maintained that if the consent of Texas were obtained it could be annexed by treaty; but he based his opposition upon the ground that treaty alone could accomplish the result.[2]

Those who supported the joint resolution did so upon one or more of these grounds. The incorporation of foreign territory, it was said, is an attribute of sovereignty; and as no attribute of sovereignty was lost when the constitution was adopted, and this power no longer belonged to the states, it must belong to the United States; and an act of Congress was the most appropriate manner of exercising the power.[3] Others asserted that the joint resolution was a proper act of secondary legislation, and justified it in order to promote domestic commerce and provide for the common defence.[4] A third view was that the express grant of power to admit new states included the power to admit a state not yet the property of the United States.[5] The last, perhaps the weakest, of the three met with the widest acceptance. Another argument somewhat pressed was that Texas once was a part of the United States, and having wrongfully parted with her the United States was under an obligation — at all events a moral one — to restore her to her true position. But throughout the whole discussion it is rare to find an unbiased speaker; the all-absorbing question was: Shall there be another slave state?[6] Slavery was allowed to influence the view taken of the constitution. Yancy of Alabama declared it to be our constitutional duty to annex Texas in order to protect the constitutional guaranty in favor of slavery, — a guaranty which he found implied in the recognition in the constitution of the existence of that institution.[7] That there was any such guaranty his adversaries of course denied, and Winthrop went so far as to find in the prohibition of the slave trade after 1808 an implied condemnation of slavery, and a ban upon the admission of any further slave states.[8] These latter arguments may be disposed of now by saying

[1] Cong. Globe, 28th Cong. 2d Sess. 344 (Walker).

[2] Id. 188, 190.

[3] Id. 328, 344, 109 (Ashley and Walker in the Senate; Owen in the House).

[4] Id. 334 (McDuffie in the Senate); 102, 118, 167 (in the House, Bayly, Weller, and Caldwell).

[5] Id. 329, 334 (Dickinson and McDuffie in the Senate); 95, 100, 182, 186 (in the House, Douglass, Yancy, Ficklin, Dromgoole, etc.).

[6] See for example the speeches of Allen in the Senate and Joshua Giddings in the House, Cong. Globe, 28th Cong. 2d Sess. 342, 169.

[7] Cong. Globe, 28th Cong. 2d Sess. 100.

[8] Id. 94.

that they had little virtue then, and are to-day wholly unimportant except to serve as illustrations of the length to which men went to bring in the question of slavery. The relative values of the other and more important lines of reasoning will be considered later; for the present it is sufficient to note the fact that these points were made.

By reason of these arguments of the friends of the President, and in spite of the arguments of the opposition, — or perhaps without any reference at all to any arguments on the constitutional question, — the annexationists carried their point. The joint resolution passed both Houses that "Congress does consent that the territory properly included within and rightfully belonging to the republic of Texas may be erected into a new state to be called the State of Texas . . . in order that the same may be admitted as one of the states of this Union," upon certain conditions; to this the Senate added the provision that if the president should deem it advisable "be it resolved that a state to be formed out of the present republic of Texas . . . shall be admitted into the Union by virtue of this act." [1] Under this last provision Texas was admitted.

From this time on events came thick and fast, and the race between the two parties of individualists became more and more furious, — on the one hand, those who looked to the freedom of every inhabitant of the United States, and on the other, those who sought the freedom of the state in the subserviency of the individuals within it. The main struggle came over the government of territory when acquired; but the struggle on the part of the South was also to gain territory out of which to mould slave states. The nation was rushed through an impious war with Mexico, and by conquest and by subsequent treaties California, Arizona, and New Mexico were added to our possessions, with a proviso, as in the case of Louisiana, for their incorporation into the Union. To the treaties of cession there was little opposition on constitutional grounds; acquisition of territory by treaty was an old story, and the people were sick of this war. The bitterest opposition was to the first treaty, that of Guadaloupe Hidalgo,[2] by which the United States acquired an enormous tract of possible slave territory. The debate in the House over the appropriation to carry out the treaty

[1] Cong. Globe, 28th Cong. 2d Sess. 362; 5 Stat. 797. See also 9 Stat. 108.

[2] 9 Stat. 922.

was such as fully to justify Christfield's complaint, — "But, sir, this debate has glided from the topics properly before us, and we now find ourselves in the midst of the slavery question." [1] It is striking that while the anti-slavery party urged almost every possible objection to the treaty, scarcely a word was said against acquisition of territory by the treaty-making power; the nearest approach to such an objection was made by those who, like Mr. Stephens, denounced a war of conquest as contrary to the spirit of the constitution.[2]

Much calmer was the debate upon the appropriations to carry out the Gadsden treaty, by which the United States acquired most of what is now New Mexico and Arizona.[3] The character of the country was such that the slavery question drew to the background.[4] There was, nevertheless, determined opposition,[5] yet no one objected generally to the principle of acquiring territory by treaty.

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[1] Cong. Globe, 30th Cong. 2d Sess. App. 227.

[2] Id. 145. The fight against this acquisition of territory began in the 29th Congress. The appropriation of three million dollars, made before the treaty was negotiated, was coupled originally with the Wilmot proviso, excluding slavery from the territory to be acquired. Upon this proviso turned most of the debate, and the proviso was eventually stricken out by the Senate. 9 Stat. 174.

The part which slavery played in the contest over the final appropriation bill in the 30th Congress is illustrated by Schenck's amendment. That amendment provided that California should be given back to Mexico. It was rejected by the vote of 194–11; among the eleven who voted for it were Horace Mann, Giddings, and Palfrey, — all strong opponents of slavery. Upon the final question on the appropriation in the House, Giddings still voted against it; Palfrey voted for it, obviously because if the United States were to keep the territory it would be unconscionable not to pay for it; Horace Mann did not vote. Cong. Globe, 30th Cong. 2d Sess. 557, 558, 559; 9 Stat. 348.

[3] 10 Stat. 1031; id. 301.

[4] See the dialogue between Smith of Virginia and Perkins of New York, Cong. Globe, 33d Cong. 1st Sess. 1548, 1549.

[5] There was much discussion whether Congress had discretion in granting or withholding the appropriation. The general view was that Congress had such discretion. Those opposed to the purchase either agreed with Benton (Cong. Globe, 33d Cong. 1st Sess. 1519, 1520) that the privilege of the House had been violated by negotiation of the treaty without the House having been first consulted, or else took the ground emphasized by Giddings (who, however, also agreed with Benton) that the House had not sufficient data to judge of the value of the new country, and that suspicious circumstances raised a presumption against the treaty (id. 1541).

The opposition to the appropriation was confined almost wholly to the House. The majority, in both House and Senate, were anxious to carry out the treaty in order to put an end to the dispute with Mexico, to arrange boundary difficulties, to escape certain onerous undertakings entered into in the treaty of Guadaloupe Hidalgo, and to secure a railroad route to the Pacific. Of this general line of argument the speech of Boyce in the House is a fair sample. Cong. Globe, 33d Cong. 1st Sess. 1543.

But the race for territory was not yet ended. This race did not on the side of either party signify a change in foreign policy, or show that either was departing from the idea of the national individual. Neither considered that question as at all a vital one. The point of view remained as it had always been, wholly subjective, and whoever desired foreign territory desired it merely with reference to the one domestic question of vital concern. In so far as the matters already touched upon are concerned the South had won the race in acquiring territory, although their triumph was somewhat qualified by the acts for regulating the territories when acquired. There were two attempts to acquire further territory which failed, — one immediately after the close of the Mexican war, and the other shortly afterwards. The first was aimed at Yucatan. In 1848 a message from President Polk informed Congress that the people of Yucatan were in danger by reason of an Indian uprising, that they had offered to give themselves to the United States in return for protection; he urged the giving of aid for the sake of the Monroe doctrine, for if the United States refused aid England or Spain would be applied to. As a matter of national policy the affair is not to be taken too seriously. It was a bait thrown out by the pro-slavery cabal, and although it drew some unsuspecting supporters, it did not take with all the southern side. Calhoun bitterly attacked the proposition as an unwarrantable extension of the Monroe doctrine, and after it was referred to the committee on foreign affairs it was not further heard of.[1]

Towards the end of Fillmore's administration the revolution in Cuba became prominent. An offer was made in 1848 by Buchanan, as secretary of state, of $100,000,000 for the purchase of the island; but Spain indignantly spurned the offer.[2] Frequent aggrieved complaints came from Spain that the neutrality of the United States was not very genuine. Genuine it certainly was not, and Fillmore's attempts to prevent filibustering expeditions were designedly incompetent. Twice were expeditions allowed to reach Cuba in aid of the insurgents, and when President Pierce came into office the South had taken up the cause of Cuba as a possible new slave state. The second Lopez expedition was landed in Cuba, but the Spaniards soon got the upper hand, and, foolhardily though justly, executed the ringleaders. This piece of bravado did not

[1] Cong. Globe, 30th Cong. 1st Sess. 709–740, 777, 778.

[2] 3 Von Holst, 441. The agitation in favor of Cuba is well described in this volume and in those following.

tend to calm the feelings of the Cuban sympathizers in this country; in fact they burned the Spanish consulate in New Orleans, looted the houses of the Spaniards, with the aid or at least with the connivance of the police, and did many things that they ought not to have done. Matters had reached a pass when the President could no longer remain in a colorless position; vigorous steps were taken to suppress filibusterers. But the question was not allowed to end; the President had only gone about on a new tack. Soulé was sent as minister to Spain with instructions to buy Cuba. Spain was by this time considerably irritated and would hear nothing of it. Souél thereupon concocted the Ostend manifesto in the summer of 1854, — a declaration to the world that the United States wished to buy Cuba with a hint (whether designed or not is a matter of conjecture) that if Spain would not sell, the United States would have to levy upon the property. Soulé continued in this vein a little too far and had to be disavowed; but the purchase of Cuba was still agitated until the Civil War. The hollowness of the whole affair, however, apart from the question of slavery, became evident whenever it was rumored that Spain proposed to emancipate the slaves in the island. Such emancipation would destroy Cuba's eligibility as a slave state; it would also add stimulus to the general cause of emancipation. Therefore, it was said, this emancipation when it came, would be a cause for war with Spain, a war of self-preservation on the part of the United States.

The fight between the individualism of the state, which had long become a dogma rather than a creed, and the freedom of the individual, lasted to reach the triumph of the latter in the Civil War. In the sovereign nation the general doctrines of Bentham first reached their recognition, and became a part of our national existence. The opposition which would have come from the state rights party was put an end to by the chance which made that party for its own ends the champion of each particular acquisition of territory. And after the new territory had become recognized as a part of the United States, no party had much heart in denying that there was power to do what had in fact been done. Now at last the ideas of individualism had circulated through the nation's entire frame until they were recognized as the principles applicable to each man as a man. The movement which started with the Pilgrims had worked itself out, or had at least reached a new stage. As touching the nation new thoughts and feelings had already found utterance,

which were strange to the ears of the older men. Perhaps it was a mere political game that Webster was playing when he voiced the attitude of the Union towards Kossuth in his struggle against Austria for the liberty of Hungary.[1] But his letter to the Austrian minister, while disavowing any intention to intervene forcibly, was aggressive in tone; it threw the moral influence of the United States, not for the preservation of democratic institutions at home, but for the introduction of these institutions into foreign lands; its objective attitude was a marked change from the subjective attitude with which we had formerly defended ourselves against the Holy Alliance. On Webster's part this may have been, as I have said, merely a move in his political chessmen, but the response which it received throughout the country, especially in the north, showed a genuine feeling that our liberties were objective as well as subjective. The same chord had been struck by some few disinterested persons who had favored interference in Yucatan for the sake of the Yucatanese, and who were eager to interfere in Cuba for the sake of the Cubans; but there were not yet many such persons — few could be so blind as not to see that the slave-holders were using their sympathies as tools. Kossuth's visit accomplished nothing for him, but it served to bring out two facts; not only, as I have already hinted, that the party of the south could not in the same breath talk about the liberties of Hungary and the institution of domestic slavery, but also that a change was coming on in the attitude of some people to the doctrines of Washington's farewell address. President Pierce in his inaugural said that territory was to be acquired in every honorable way, and in the course of it he used the word "expansion," with which the country is now so sorely afflicted. The Koszta affair too was another note in the same key. It became clear that as a nation the Union was becoming unwilling to live apart and was growing anxious to make itself felt as a positive influence upon the affairs of other nations.

The change in public opinion which thus manifested itself was not confined to foreign politics. It was a phase in that great movement still going on, the movement of combination and collectivism, in which the freedom and benefit of the individual are being made to give way to the good of the aggregate. It was in relation to the affairs of individual persons that the change first became marked. Trades and employers were combining; corporations

[1] 4 Von Holst, 69, 73.

were multiplying. The idea of legislation was quick to change, a change which appeared in two kinds of legislative acts. Of these one kind took upon the state the performance of acts supposed to be for the public benefit, acts which before had more generally been left to private enterprise. The people as individuals were more and more taxed for the collective good of the people as a whole. Illustrations of such legislation may be found in the frequent exercise of the right of eminent domain for the benefit of railroads on an enormous scale; and different forms of the exercise of the police power fill the reports each year with an increasing number of decisions whether they deprive the individual of life, liberty, and property. It is not the passage of the Fourteenth Amendment alone that has caused this change: it is a real increase in the legislative acts, passed presumably for the public weal, which work oppression to individual members of the community.

The change is seen also in another class of acts, standing beside and sometimes among the acts last mentioned. These are acts of what is called paternal legislation, carried to such an extent that the most ordinary pursuits of everyday life are restricted and regulated. Improvements cannot be made in the plumbing in a man's house except in a way sanctioned by an official; no building can be erected except as approved. Liquor cannot be bought except under certain circumstances, and in some places not at all; and matters are subjected to public control which a man of Bentham's views might well declare were no one's business except his own.

Nations as well as persons were affected by this change in the state of public opinion. The same tendency to combination was evinced, notably in the case of the concert of Europe; and even in the absence of combination the aggressive, the objective, attitude became more marked. The most selfish nation found its object of desire, not in the independent, unhampered life of free competition, but in the life of aggression. Its aim became that of impressing itself upon others, and of extending its influence at others' expense. And so also the attitude of altruism became altered, and the most unselfish nation saw the highest service, not in permitting other nations to work out their own problems, but in offering advantages and compelling their acceptance, — with very little thought whether the forms or even the substance of these advantages were in conformity with the wishes of the objects of charity.

The atmosphere which pervaded the concert of Europe has blown

over our hemisphere, and has affected our political thought. When a correspondent of one of our newspapers writes that the Monroe doctrine logically extends to China, and we should interfere to prevent foreign nations from getting a foothold there, his statement is absurd enough, for it is not the Monroe doctrine at all. And yet there is a germ of truth in it; his new doctrine bears precisely the same ratio to the modern collectivist public opinion that the Monroe doctrine bore the individualist public opinion. It is not my province here either to condemn or to defend the new view; I speak of it merely as indicating the radical nature of the change expressed by the new state of public opinion.

The change in national feeling did not at once become strikingly apparent. It is true that the affair in Mexico, when at the close of the Civil War Louis Napoleon endeavored to form an empire there, was carried out with aggressive decision on the part of the United States. But in that matter the position taken by the United States was in fact, if not in spirit, consistent with the Monroe doctrine; its effect was to confirm to this United States the privilege of managing its own affairs without collision with the interests of a European nation. And indeed, until we come to the affairs of Samoa and of Hawaii, all of our dealings with foreign nations since 1864 would have been justified by the general idea of the Monroe doctrine; but the spirit which inspired them may be thought to have been quite different.

First came the treaty of 1867 purchasing Alaska from Russia. Twice before had offers been made to Russia for the country, once by Van Buren and once by Buchanan;[1] but this had not become generally known. There was now fierce opposition when the proposition came up in the House to make the appropriation to complete the purchase, yet there was but faint suggestion that the United States had no power to acquire foreign territory.[2] Delano denied to the President and Senate such power, and he did so solely on the ground that it rested with Congress instead.[3] The only serious constitutional argument was on the question whether

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[1] Cong. Globe, 40th Cong. 2d Sess. 3662. Statement by Banks.

[2] Id. App. 485 (Williams). On page 135 of the Globe, Washburn took the ground that no territory could be acquired except in case of necessity. For this statement he quoted Jefferson. But for some reason this argument does not appear in his speech as revised for the Appendix, where he dwelt chiefly upon the right of Congress to withhold the appropriation.

[3] Cong. Globe, 40th Cong. 2d Sess. App. 452.

Congress had any right to withhold the appropriation; the opposition took the ground that a treaty requiring an appropriation of money before it could be carried out did not become a complete treaty, "the law of the land," until the appropriation had been made.[1] They sought in this way to establish the proposition that Congress might refuse the appropriation, and then argued that on grounds of policy we wanted no such barren and unprofitable place as Alaska.[2] A few made the point that Alaska was not contiguous, but this was argued as essential from the political, not from the legal point of view.[3] Hardly any one disapproved "expansion" (as it was now usually called) in general, but only in this particular case. On the other side we hear the change unmistakably. Precedent was not broken with only because it was not necessary to do so; the expulsion of Russia and the checking of England were in line with the policy of removing European affairs from this hemisphere;[4] but this was not the sole motive in the general feeling of aggressiveness. Stevens of Pennsylvania said, "The vastness of the nation is very often the strength of the nation."[5] Others wished to prepare for the time when the United States and Russia should be the two great world powers;[6] and Mr. Mullins[7] with true Hibernian impetuosity took for his motto the Anglo-Saxon race and the Bible, and wanted Alaska "because the American nation in its mighty march onward will have it; I want it peaceably if we can; never forcibly if it can be avoided."

Perhaps these instances misrepresent the general attitude of the House; but it is significant that a party large enough to make itself felt professed such opinions. We are now wholly in the realm of politics — not again until the last year was our constitutional question mooted. But the politics of these thirty years must be touched upon as illustrating the tightening of the grasp of collectivist ideas around our throats. A treaty was negotiated by Seward for the purchase of the island of St. Thomas from Denmark.

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[1] Cong. Globe, 40th Cong. 2d Sess., 1870, 3621, 4053 (Wood, Loughbridge, and Schenck).

[2] Cong. Globe, 40th Cong. 2d Sess. 3807. App. 392 (Loan and Washburn, *inter alios*); App. 380 (Price); App. 473 (Cullom).

[3] Id. App. 377 (Shellabarger); App. 400 (Butler, also protesting against further extension of American citizenship).

[4] Cong. Globe, 40th Cong. 2d Sess. 3661 (Myers); App. 385–387 (Banks).

[5] Id. 3660. (See also on the same page Donnelly, and App. 388–389, Banks.)

[6] Id. 3659 (Mungen).

[7] Id. 3669.

While the matter was pending the unlucky island was afflicted by a hurricane, a tidal wave, and an earthquake, all in one year, — enough to shake the will of the most ardent expansionist. One cannot wonder that there was little opposition in the House to Washburn's resolution protesting against further purchases of territory.[1] The treaty long hung fire, and finally fizzled out. More active was the proposition for a protectorate over Hayti and San Domingo in 1869, — not in itself a serious departure from the ideas of Monroe and Adams, but calling forth remarks about our manifest destiny, which Spalding thought was to embrace Hawaii,[2] and Robinson extended to Ireland;[3] Butler stated reasons to himself seemingly conclusive why we had outgrown the ideas of the father of his country.[4] The House resolution extending the protection of the United States over the island was defeated in the House; but the agitation was not without its effect. In spite of our leniency with Spain in regard to the "Virginius" affair, we began to take a more active interest in Cuba; and the concessions made by Spain to the Cuban rebels in 1878 were due to some extent to our pressure. Then we got a foothold in Samoa, very tentatively, but suggestively; the Venezuela matter also was aggressive. In all of these cases except Samoa the action of our government was in the letter well in accord with the idea of 1820. But the tide was flowing in a different direction, although in these cases it accomplished the same results.

The events of the last few years are too recent to require comment. Spain's promises made to the Cubans in 1878 were broken, and in 1895 rebellion broke out anew.[5] Mr. Cleveland contented himself with protesting, but intimated that under some circum-

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[1] Passed the House November 25, 1867, Cong. Globe, 40th Cong. 1st Sess. 792. "*Resolved*, That in the present financial condition of the country any further purchases, of territory are inexpedient, and this House will hold itself under no obligation to vote money to pay for any such purchase unless there is greater present necessity for the same than now exists."

At this time the treaty purchasing Alaska had been completed, although the appropriation had not yet been made. It was generally understood that this resolution was directed only against St. Thomas.

See Pierce, Life of Sumner, iv. 328, 329, 613–624.

[2] Cong. Globe, 40th Cong. 3d Sess. 333, 334.

[3] Id. 336.

[4] Cong. Globe, 48th Cong. 3d Sess. 336. His speech is striking in comparison with his speech on the Alaska Treaty, *ante*. See also the speech of Banks, chairman of the House Committee on Foreign Affairs, at p. 317.

[5] Lodge, The Spanish-American War, Harper's Monthly, xcviii. 449.

stances we might do more than protest. Mr. McKinley came in pledged to the relief of Cuba. The oppression of the reconcentrados, the De Lome letter, the blowing up of the "Maine," lighted a fire which no reason could put out. The followers of the doctrine of Monroe and Adams saw a chance for a foothold in Cuba, and an opportunity to push Spain away from this hemisphere, — which was indeed the passive Monroe doctrine turned active. The same men talked of how Spain had become a nuisance; but this was not legally conclusive, and only served as a mask for other thoughts. With these joined the adherents of the new ideas, who wished a foreign policy for its own sake, for the sake of ourselves, or for the sake of the Cubans; these showed on the one hand the selfish phase and on the other the altruistic phase of aggressiveness. War began and ended, and the object of desire grew from a foreign policy to foreign possessions, — for their own sake, for the sake of ourselves, or for the sake of the people of those new possessions.

The middle of the summer saw the admission of Hawaii. The affair had long been brewing: Mr. Harrison had negotiated a treaty which was withdrawn by Mr. Cleveland. A new one was soon arranged. But the islands were finally annexed by joint resolution; they were not, like Texas, admitted at once as a state, but were incorporated in the Union.[1] Porto Rico and the Philippines are ours by treaty, but for the first time there is as yet no provision or legislative act making them a part of the United States as a sovereign, and their status remains unsettled.[2] I will not digress upon the subject of their government. Suffice it to say that constitutional objections have been made to their acquisition. It has been said again that territory cannot be acquired without the consent of the inhabitants, or unless they are capable of receiving republican institutions, or unless the territory is geographically near to us.[3] These arguments are by the more conservative men, who look upon the spirit of the past as a part of the constitution. The other side carried the day; they insisted on the constitutional power to acquire any territory whatsoever. Whether the constitution is violated or not is a serious question. At all events it is a stern fact that the acquisition of the Philip-

[1] 30 Stat. 750. [2] 30 Stat. 1754.

[3] A collection of the authorities would be unprofitable. In regard to Hawaii the opposition was well represented by Senator Morrell, and in regard to the Philippines and Porto Rico by Senator Hoar. The majority were well represented by Senator Lodge, and by Senator Platt of Connecticut.

pines (if, as seems probable, it is a permanence) is, for reasons which cannot be explained except as a break with the past, — a change.

The bearing of this change in national public opinion upon our constitutional law is important. If we understand it we can analyze all the talk which we have heard in the past and in the present, and can tell how much of what has been called law is really law and how much of it is really politics. In this search we may recur to the rule already laid down as fundamental: A constitution must not be construed as prohibiting changes in public opinion, for a constitution which should attempt to do this would be a failure. Public opinion is indeed to be considered in construing the meaning and scope of actual constitutional provisions, but it should not be used to impose restrictions upon the sovereign powers of the nation when none are expressed.

Let me illustrate what I mean from another branch of the law. In construing the phrase "due process of law," it is permissible to look at public opinion in 1788, and to find that the Mill Acts were universally looked upon as a proper exercise of legislative power; it is then proper to say that these Mill Acts, although they sometimes amounted to a deprivation of property, were in a true sense "the law of the land," "due process of law." But when we find that the convention looked upon all retrospective laws as very improper, we cannot for that reason make a clause out of whole cloth and import it into the constitution, just as if it had expressly said, "Congress shall pass no retrospective laws."

The relevance of this consideration will presently appear. Two ways only that have been employed for acquiring territory have been seriously questioned. The first is the treaty-making power, and we inquire whether this is a legitimate means. Here again we have recourse to public opinion as our interpreter, and we find that at the time when the constitution was framed a treaty — using the word broadly, as including all compacts between nations — was by far the most common method for transferring territory from one nation to another. It would be wrong then to suppose that the constitution did not confer upon the sovereign which it created all the recognized attributes of the treaty-making power. Can a treaty not only acquire territory but incorporate it as a part of the sovereign nation? With the reservation that the territory could not thus be directly admitted as a state, there is no reason to doubt that the treaty power is adequate. By treaty Scotland became a

part of Great Britain, and Alsace-Lorraine a part of Germany; why not Louisiana a part of the United States?

The next inquiry is in regard to the limitations, if any, upon the territory that may be so acquired. It is said that it must be contiguous. It is true that all through the era of individualism only contiguous territory was looked upon as eligible; but here we must draw the line between law and politics, and not imply a limitation upon the recognized scope of the treaty-making power merely because of the unexpressed opinion of the framers. It is said that the country taken must be susceptible of a republican form of government, sympathetic with our ideas, and capable of receiving statehood. All this is good advice to those who make treaties, but it is not a part of the constitution. And the same answer is to be made to the argument of John Quincy Adams, recently repeated with so much ability and earnestness by Senator Hoar, that no country can be taken without the consent of the governed. The Declaration of Independence well expressed the opinion of the time, but that document no more than the public opinion itself is a part of the constitution. It is useful as interpreting the clauses of the constitution, but it cannot itself create a clause or a limitation. And it was too well recognized a fact that treaties as well as wars were often made without the consent of the inhabitants of a particular part of a country, for us to suppose that the force of a treaty was made to depend upon the wish of the people negotiated about.

All of these arguments in short are merely the offspring of the reasons which justified the acquisition of territory in the eyes of the people of a particular time. All are fostered by the fundamental idea of individualism but individualism is not a part of the constitution.

In this connection it is worth noting that the prevailing opinion in 1788 as to the use of a constitution did not require a panacea for all bad legislation, and the general attitude of the people in favor of putting only a few fundamental limitations upon Congress — almost none except to regulate dealings with the states — leads one to suppose that no limitation upon the treaty-making power was intended when none was expressed. The modern conception of a constitution in the present collectivist movement is wholly different; as the legislature is expected to regulate every walk of life, so modern constitutions are expected to regulate every piece of bad legislation. It was not so in 1788, and in constru-

ing our Constitution this matter is to be constantly borne in mind.

So far as we can derive any assistance from the decisions of the Supreme Court, the view that the treaty-making power is unlimited in scope is fortified.[1] The question naturally enough has never been directly decided; after annexation has once taken place the matter becomes so decidedly a matter of politics that there is hardly place for independent judicial consideration. But the court has repeatedly discussed and upheld laws passed by Congress for the government of territory when acquired; and in upholding the legislation the propriety of the acquisition is necessarily taken for granted. By way of *dictum* the power to acquire territory by treaty is assumed as a matter of course; and from the Federalist Marshall to Democratic Taney no hint can be found of any limitation upon the power.

Annexation of territory by joint resolution remains to be dealt with. Hardly a decision of a court has passed upon this matter even incidentally. Texas was at once admitted as a state, and the court had no chance to pass upon the validity of territorial acts for its government. Yet every case which assumes the binding force of revenue laws or other United States statutes in Texas assumes the rightfulness of Texas's admission, and every case supporting an act of Congress for which a representative of Texas voted. The same is true of the cases which affirm the right of Texas to sue and be sued in the United States courts.[2] But such cases are of little value; the political nature of the question practically forced upon the courts their position. Historians of ability have main-

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[1] This statement will be found to be borne out by reference to the following cases: Séré *v.* Pitot, 6 Cranch, 332; Loughborough *v.* Blake, 5 Wheat. 317; American Insurance Co. *v.* Canter, 1 Pet. 511; Benner *v.* Porter, 9 How. 235; Fleming *v.* Page, 9 How. 603; Webster *v.* Reid, 11 How. 437; Clinton *v.* Englebrecht, 13 Wall. 434; Reynolds *v.* United States, 98 U. S. 145; National Bank *v.* Yankton, 101 U. S. 129; Murphy *v.* Ramsay, 114 U. S. 15; United States *v.* Kagama, 118 U. S. 375; Callan *v.* Wilson, 127 U. S. 540: Church of Latter Day Saints *v.* United States, 136 U. S. 1; Jenes *v.* United States, 137 U. S. 202; Duncan *v.* Navassa Phosphate Co., 137 U. S. 647; Cook *v.* United States, 138 U. S. 157; *In re* Ross, 140 U. S. 453; McAllister *v.* United States, 141 U. S. 174; Shiveley *v.* Bowlby, 152 U. S. 1; American Publishing Co. *v.* Fisher, 166 U. S. 464; Springville *v.* Thomas, 166 U. S. 707; Thompson *v.* Utah, 170 U. S. 343.

It is only due here to acknowledge my indebtedness to Professor Langdell, Professor Thayer, and Mr. C. F. Randolph, whose articles may be particularly consulted in 12 HARVARD LAW REVIEW, pages 365, 464, and 291, respectively.

[2] Texas *v.* White, 7 Wall. 700; United States *v.* Texas, 143 U. S. 621.

tained that the exercise of the power by Congress is unwarranted, but their arguments on the whole are unconvincing. Granted that two of the grounds on which the power is claimed are unsound, a third is difficult to refute. The power, as has already been shown, cannot properly be claimed under the express provision for the admission of new states. Nor can it be asserted as an attribute of sovereignty which would be lost to the nation if Congress did not exert it. The answer to the last argument is that the treaty-making power is strong enough to carry out alone any such act of sovereignty. And yet on a third ground the power of Congress may be justified, for it cannot be said that the annexation of territory is not a legislative act. If the annexation required a treaty with a sovereign nation from which the territory came, Congress might not be able to cover the entire ground; but no such case has yet arisen. To deal simply with the cases so far, Congress annexed the whole of Texas and the whole of Hawaii, and no other sovereignty could object. So far as other nations were concerned it was as if Congress had voted to take possession of an unoccupied and unowned desert. Regarded as a legislative act the only limit upon its exercise is that it shall be used for one of the ends for which Congress is expressly authorized to legislate. It may be that Texas and Hawaii were not taken for one of these ends; but if the question should come up in the courts to-day (granting that the courts should consent to consider a question of so political a nature) they would undoubtedly hold the legislation valid. Congress would properly be given the credit of wide discretionary power; and in no case hitherto could it be properly said that annexation was so remote from any permissible end of legislation — regulation of commerce, for instance, or provision for defence — that it could not have been a "necessary and proper" means to that end.

The conclusion then is that as a mere question of power there is no restriction upon obtaining territory by treaty; and upon the obtaining of territory by joint resolution, the only limitation is that it shall be a proper piece of legislation. The constitution created within its sphere a complete sovereign; and although the sovereign powers, including the power to pass laws for specified ends, the power to make war, and the power to make treaties alike, may be used unadvisedly and unjustly, there are no constitutional restraints upon such use. I have believed that they have been so used during the past year; but I shrink from befogging

the issue, which is moral, by contending for an improper view of the legal power of the United States. In the heat of a legal argument one is apt to conclude "this is legal, therefore it should be done;" forgetting that "it is wrong, therefore it should not be done." And the great changes in public opinion, eliminated from the law and considered by themselves, deserve our gravest thought. Those who are to the fullest extent in touch with the prevalent aggressive ideas should count the cost, and remember that in taking the Philippines we can hardly escape the doctrines of the balance of power which we avoided seventy years ago. Those who are looking a little less high, and hope for an empire in this hemisphere independent of European domination, should remember that if once we put ourselves in competition with the powers of Europe in the East, the powers of Europe will not allow us to continue here to enrich ourselves uninterrupted. Those who believe as I do that our first duty is to govern ourselves, that the general doctrines of individualism are being unduly slighted, and that our form of government must first justify itself at home before we take upon ourselves further burdens, see in our present course cause for disquiet. Yet pessimism is abhorrent; and it cannot be doubted that a nation, like a man, is greatest, not when its experience is limited by artificial restraints, but when through experience, through suffering, and, if it must be, through wrong, it has reached to higher things. At all events these are political matters, so grave that they would submerge any Constitution; and whatever side one takes, it may be questioned whether he strengthens his position by calling to his support forced doctrines of constitutional law.

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